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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PROGRESSIVE WEST INSURANCE
COMPANY, an Ohio corporation,

Plaintiffs,

V.

BUN BUN TRAN, LEONEL ARRELLANO,

Defendants.

NO. 07- CV 1999 JAH (POR)

**NOTICE OF MOTION AND
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION; RULE 12(b)(1);
DECLARATION OF JOSEPH DI
MONDA, ESQ.**

Time: 2:30 p.m.
Date: January 14, 2008
Ctrm.: 11
880 Front Street
San Diego, CA 92101

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 14, 2008, or as soon thereafter as the matter may be heard in the above-entitled court, located at 880 Front Street, San Diego, CA 92101, defendant Bun Bun Tran, by and through his guardian ad litem Le Thi Nguyen, will move the court to dismiss the action pursuant to FRCP 12(b)(1) because plaintiff's complaint fails to state a cause of action on which relief can be granted because the court lacks subject matter jurisdiction.

The motion will be based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Joseph Di Monda, Esq., and the

1 pleadings and papers filed herewith.

2

3 Dated: November 27, 2007

4

5 ANGELO & DI MONDA, LLP

6 By: _____
7 Christopher E. Angelo
Joseph Di Monda
Attorneys for Defendants,
Bun Bun Tran and Le Thi Nguyen

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1 **I. INTRODUCTION**

2 BUN BUN TRAN (“TRAN”) was catastrophically injured in an automobile accident
 3 (“the Accident”) on November 18, 2006, in the City of San Diego. The vehicle which collided
 4 with TRAN was driven by defendant LEONAL ARRELLANO (“ARRELLANO”). TRAN was
 5 taken to the University of California San Diego Medical Center where he stayed for
 6 approximately 3 months in a coma. TRAN is presently at Sharp Medical Center in San Diego in
 7 a non-communicative vegetative state. Declaration of Joseph Di Monda.

8 TRAN, by and through his guardian ad litem, LE THI NGUYEN (“NGUYEN”) filed an
 9 action (“the Third Party Lawsuit”) in San Diego Superior Court against ARRELLANO, and also
 10 against Patricia Cole (“COLE”), Chili’s Restaurants (“CHILI’s”) and the City of San Diego (“the
 11 CITY”). San Diego Superior Court Case number 37-2007-00065432-CU-PA-CTL, Department
 12 C-62, the Honorable Ronald L. Styn, Judge. Declaration of Joseph Di Monda.

13 Leonel Arrellano, was arrested by the San Diego Police Department and charged with
 14 driving while intoxicated. On or about February 15, 2007, Mr. Arrellano pled guilty to various
 15 felonies arising out of driving while intoxicated and leaving the scene of an accident. On June 8,
 16 2007, Mr. Arrellano was sentenced to, and is now serving, a six year and four month sentence at
 17 the Sierra Conservation Center in Jamestown, California. Decl. of Joseph Di Monda.

18 TRAN’s damages will reach tens of millions of dollars.

19 TRAN reached a tentative settlement with defendant COLE. COLE filed a motion for a
 20 determination of good faith settlement and the CITY opposed COLE’s motion. The San Diego
 21 Superior Court is permitting the CITY to conduct discovery into COLE’s assets and financial
 22 condition to determine if she should pay a higher settlement amount. COLE’s settlement is
 23 pending. Decl. of Joseph Di Monda.

24 CHILI’s has filed a motion for summary judgment which TRAN will oppose.

25 TRAN’s theory of liability against the CITY is based upon, among other things, TRAN’s
 26 allegations that the Stop sign which ARRELLANO failed to stop at was obscured by foliage
 27 which the CITY permitted to grow on CITY owned property, and that the CITY’s negligence in
 28 not trimming said foliage created a dangerous condition of public property. ARRELLANO also

1 contends that the Stop sign was obscured by foliage and that he was unable to see said Stop sign
2 which is why he failed to stop thereby colliding with TRAN. The CITY is conducting discovery
3 on those issues. Decl. of Joseph Di Monda.

4 No judgments have been entered and no determinations of liability as to any party have
5 been made. At this time no trial date has been set. Decl. of Joseph Di Monda.

6 ARRELLANO is an illegal alien. Despite his illegal immigration status, Progressive
7 West Insurance Company (“Progressive”) sold ARRELLANO an automobile liability insurance
8 policy (“Liability Policy”) in the amount of \$15,000.00. Decl. of Joseph Di Monda.

9 Prior to filing the Third Party Lawsuit, TRAN made a demand on Progressive for
10 ARRELLANO’s \$15,000.00 Liability Policy. Progressive did not tender the Liability Policy.
11 TRAN’s position is that since Progressive failed to tender the Liability Policy when demanded,
12 the Liability Policy now has no liability limit and that Progressive is liable for any amount which
13 a jury may find ARRELLANO must pay.

14 Progressive has filed this present federal lawsuit asking for a declaration of its rights and
15 responsibilities under ARRELLANO’s \$15,000.00 Liability Policy.

16 Progressive is asking this Court to declare that it has not committed bad faith under
17 California insurance law and hence can never be liable for any amount over the \$15,000.00 limit
18 of the Liability Policy.

19 **II. SUMMARY OF TRANS’ ARGUMENTS AS TO WHY PROGRESSIVE’S
20 LAWSUIT MUST BE DISMISSED**

- 21 1. The issue is not ripe because there has not been any determination of damages
22 which may be owed by any party.
- 23 2. The issue is not ripe because there are a number of events which must occur
24 before Progressive may be liable for over-limits bad faith. Such as:
25 a. TRAN has to obtain a judgment against ARRELLANO in an amount over
26 the \$15,000.00 policy limit. Since ARRELLANO has blamed the CITY
27 for the obscured stop sign, a jury may in fact find that the CITY is the
28 party which must bear the most liability and find ARRELLANO liable for

an amount less than the \$75,000.00 minimum required to create federal diversity jurisdiction;

- b. Even if a jury finds ARRELLANO liable for an amount over the \$15,000.00 Policy limit, ARRELLANO would have to assign any bad faith rights to TRAN and TRAN would have to bring an action against Progressive;
 - c. ARRELLANO could pass away before any judgment is determined, or before any assignment of bad faith rights is made;
 - d. TRAN could pass away thereby cutting off his damages to a far lesser amount.

Progressive's alleged \$75,000.00 diversity jurisdiction exceeds its contractual liability, hence Progressive is requesting an advisory opinion as to what it **may** be liable for in the event the above events transpire.

The alleged diversity jurisdiction of \$75,000.00 is too speculative at this time to grant this Court jurisdiction.

At the time Progressive filed this lawsuit it can never be liable for an amount greater than \$15,000.00.

III. PROGRESSIVE HAS THE BURDEN OF PROOF TO SHOW TO A LEGAL CERTAINTY THAT ITS ALLEGED DAMAGES MEET THE JURISDICTIONAL AMOUNT TO PROVIDE THIS COURT WITH DIVERSITY JURISDICTION

If defendant moves to dismiss for lack of jurisdiction, the burden of proof is normally on the party invoking federal jurisdiction to establish a “good faith” expectation of recovery of at least the minimum jurisdictional amount. *McNutt v. General Motors Accept. Corp. of Indiana* (1936) 298 US 178, 189, 56 S.Ct. 780, 785. Progressive must establish the jurisdictional amount by a preponderance of the evidence. *Meridian Secur. Ins. Co. v. Sadowski* (7th Cir. 2006) 441 F3d 536, 543.

IV. PROGRESSIVE'S CLAIMS ARE NOT RIPE AT THE TIME IT FILED THE COMPLAINT; AT THIS TIME IT CAN NEVER BE LIABLE FOR MORE THAN \$15,000; HENCE THIS ACTION IS PREMATURE

The amount in controversy required to grant this Court diversity jurisdiction must be

1 ascertained at the commencement of the action; later events generally do not affect diversity
 2 jurisdiction. Thus, diversity jurisdiction exists if the complaint as filed puts more than \$75,000
 3 at issue. *Johnson v. Wattenbarger* (7th Cir. 2004) 361 F3d 991, 993.

4 To justify such dismissal, “(i)t must appear to a legal certainty that the claim is really for
 5 less than the jurisdictional amount ... ” *St. Paul Mercury Indem. Co. v. Red Cab Co.* (1938) 303
 6 US 283, 288–289, 58 S.Ct. 586, 590.

7 Courts may look beyond the pleadings for the limited purpose of determining whether it
 8 is “legally impossible” for plaintiffs to recover the damages alleged. *Pachinger v. MGM Grand*
 9 *Hotel–Las Vegas, Inc.* (9th Cir. 1986) 802 F2d 362, 364.

10 A demand is “legally impossible” for jurisdictional purposes when it runs up against a
 11 statutory or contractual cap on damages, or when the theories of damages employ double
 12 counting. *Johnson v. Wattenbarger* 361 F3d at 994

13 Moreover, a dismissal may be upheld where defendant's liability is limited by contract to
 14 an amount less than the diversity minimum, if the court determines that such limitation is valid
 15 and enforceable. *Valhal Corp. v. Sullivan Assocs., Inc.* (3rd Cir. 1995) 44 F3d 195, 209.

16 Here, Progressive admits in its complaint that its liability policy limits its damages to
 17 \$15,000.00; far below the diversity minimum of \$75,000.00.

18 Moreover, there has been no adjudication of damages and no apportionment of damages
 19 between the various defendants. Since the amount in controversy must be established at the time
 20 Progressive filed its complaint Progressive can not show to a legal certainty what its financial
 21 exposure may be when the lawsuit is adjudicated.

22 Hence, at this time, Progressive has no way of knowing exactly what amount its insured
 23 ARRELLANO may be found liable to have to pay to TRAN.

24 **V. PROGRESSIVE SPECULATES AS TO ITS POTENTIAL DAMAGES IN ORDER**
 25 **TO CREATE SHAM DIVERSITY JURISDICTION**

26 Here, plaintiff claims a right so intangible that its value is entirely speculative. To wit,
 27 how much Progressive may be liable to pay after adjudication of the San Diego action involving
 28 the issue of liability amongst 4 defendants. At this time no one can predict to a legal certainty

1 who will be found liable and how damages may be apportioned.

2 In such cases, diversity jurisdiction will not lie for lack of jurisdictional amount. *Jackson*
 3 *v. American Bar Ass'n* (9th Cir. 1976) 538 F2d 829, 831.

4 **VI. JURISDICTION MAY NOT BE BASED UPON PROGRESSIVE'S**
 5 **SPECULATIVE ALLEGATIONS THAT IT MAY HAVE COMMITTED BAD**
 6 **FAITH AND THEREFORE MAY BE LIABLE FOR AN AMOUNT EXCEEDING**
 7 **\$75,000.00**

8 A party cannot meet the jurisdictional amount by seeking a declaration of an additional
 9 coverage not in issue at that time. *Nationwide Mut. Ins. Co. v. Rowles by Rowles*, 818 F. Supp.
 10 852 (E.D. Pa. 1993).

11 In declaratory judgment suits involving liability insurance policies, the test of jurisdiction
 12 is the maximum amount for which the insurer might be liable under the policy. *Budget*
 13 *Rent-A-Car, Inc. v. Higashiguchi*, (9th Cir. 1997) 109 F.3d 1471, 1473.

14 Here, absent bad faith by Progressive, combined with a jury determination of damages,
 15 Progressive's maximum liability under the policy is \$15,000.00.

16 A very similar issue was addressed by the court in *St. Paul Reinsurance Co., Ltd. v.*
 17 *Greenberg* (1998) 134 F.3d 1250. *St. Paul* addressed the potential for over-limits damages based
 18 upon Texas law. The *St. Paul* court found diversity jurisdiction based upon Texas law which
 19 provided for statutory damages for failure to pay a claim. *Id.* at 1254-1255. However, it was
 20 only because of the statutory penalties, which were known to a certainty and put the claim over
 21 the diversity limit which gave the *St. Paul* court diversity jurisdiction.

22 Applying the analysis of *St. Paul* to the present facts, diversity jurisdiction will not be
 23 found because "bare allegations of jurisdictional facts have been held insufficient to invest a
 24 federal court with jurisdiction." . *Id.* at 1253.

25 In *St. Paul*, the insured threatened to file a complaint against its insurer for not providing
 26 coverage and had stated the amount in controversy. Here, ARRELLANO has made no such
 27 threat to Progressive nor stated any amount. On the contrary, Progressive's federal complaint
 28 admits that any threats to sue have been made by TRAN, who is not a party to the insurance

1 contract.

2 In finding diversity jurisdiction the *St Paul* court looked at the threats made by the
 3 insured, not a potential third party litigant, and the damages the insured threatened to sue its
 4 insurer for the insurers failure to provide insurance coverage.

5 The exact opposite is happening here.

6 Here, Progressive is seeking to use the potential of extra-contractual bad-faith as the basis
 7 for invoking diversity jurisdiction, based upon an assumption that:

8 ARRELLANO will be liable for an amount exceeding \$75,000.00 and that
 9 ARRELLANO will assign the bad faith rights to TRAN and TRAN will sue Progressive. No one
 10 knows to a legal certainty, at this time, what amount ARRELLANO may be liable for and what
 11 events may transpire after adjudication of the State court action.

12 This lawsuit is nothing but a sham by Progressive to litigate a potential future bad faith
 13 action between it and TRAN prior to any adjudication of ARRELLANO's liability.
 14 Progressive's entire complaint is premature and relies on speculation.

15 Frankly, if Progressive put as much effort into defending ARRELLANO against TRAN's
 16 San Diego Superior Court lawsuit as it is putting into trying to get out of indemnifying
 17 ARRELLANO, perhaps ARRELLANO could be successful in convincing a jury that the CITY
 18 and/or CHILI's are the responsible parties.

19 **VII. PROGRESSIVE FILES A SHAM COMPLAINT IN ORDER TO LIMIT
 20 ARGUMENTS TO THE COMPLAINT'S FOUR CORNERS SO AS TO DENY
 21 DEFENDANTS' RIGHT TO DUE PROCESS, DISCOVERY AND JURY TRIAL**

22 Progressive alleges that it has a \$15,000 contract of insurance, which on its face is
 23 beneath the \$75,000 Federal jurisdictional threshold. Progressive then makes a conclusory
 24 allegation that the value in controversy exceeds \$75,000. The value in controversy can only
 25 exceed \$15,000 if there is insurance bad faith on the part of Progressive because it failed to
 26 timely settle the third party claims against its insured Arrellano by also failing to meet the
 27 conditions of Tran's settlement offer.

28 The determination of damages against Arrellano is already the subject of the San Diego

1 Superior Court personal injury litigation, and will not be determined until after this State
 2 litigation is concluded. Progressive is not a party to the State litigation, but its insured Arrellano
 3 is a party.

4 Progressive would be a hypothetical party in a potential future action only in the event
 5 that an over limits judgment is rendered against Arrellano, at which time Arrellano may assign
 6 the right to collect the over limits judgments to Bun Bun Tran while reserving the right to sue
 7 Progressive for emotional distress and punitive damages, as recommended in *Cain vs. State*
 8 *Farm* (1975) 47 Cal.App.3rd 783.

9 Only after such a bad faith lawsuit is filed may the bad faith plaintiffs discover
 10 Progressive's claims file generated in the San Diego Superior Court action. Progressive's claims
 11 file is discoverable because, "how else could they [plaintiffs] have properly determined whether
 12 (insurer) acted fairly and in good faith in its handling of the claim?" *2022 Ranch, LLC vs.*
 13 *Superior Court (Chicago Title Insurance Co.* (2003) 113 Cal.App.4th 1377, 1396; *Amato vs.*
 14 *Mercury Casualty* (1993) 18 Cal.App.4th 1784, 1788-1789.

15 In addition, only during the post-judgment secondary bad faith lawsuit may the bad faith
 16 plaintiffs discover the liability insurer's claims manual to ascertain whether it violated its own
 17 internal investigation procedures. *Glenfed Development Corporation vs. Superior Court*
 18 (*National Union Fire Insurance Co.* (1997) 53 Cal.App.4th 1113, 1118.

19 Progressive is attempting to "sham" this court into finding that only \$15,000 is owed
 20 contractually, thereby allowing it to fraudulently maintain in the future that this court had to
 21 "implicitly" find that there was no tort or bad faith liability above \$15,000 on the part of
 22 Progressive when rejecting a policy limits demand previously made by counsel for Bun Tran.

23 To add insult to injury, Progressive is asking this court to make a finding of only \$15,000
 24 being owed, either contractually, explicitly, or extra contractually implicitly, without this court
 25 having any opportunity to review, for instance, the claim's file and claim's manual, which can
 26 only be discovered after the conclusion and finality of the bodily injury case currently pending in
 27 San Diego Superior Court.

28 ///

VIII. CONCLUSION

For the above reasons, TRAN requests this court to dismiss this complaint for lack of diversity jurisdiction.

November 24, 2007

ANGELO & DI MONDA, LLP

Joseph Di Monda
Attorneys for Bun Bun Tran

1 **DECLARATION OF JOSEPH DI MONDA, ESQ.**

2

3 I, Joseph Di Monda, declare,

- 4 1. I am over the age of 18 years, I have personal knowledge of the facts stated herein
5 and if called as a witness I would and could competently testify as follows;
- 6 2. I am an attorney at law duly admitted to practice before all the courts of the State
7 of California, the United States District Court for the Southern District of
8 California and the Court of Appeals for the Ninth Circuit and the attorney of
9 record herein for defendant Bun Bun Tran (“TRAN”) and make this declaration in
10 support of the motion to dismiss for lack of subject matter jurisdiction pursuant to
11 Fed. Rule of Civ. Proc. 12(b)(1).
- 12 3. BUN BUN TRAN was catastrophically injured in an automobile accident on
13 November 18, 2006, in the City of San Diego.
- 14 4. The vehicle which collided with TRAN was driven by defendant LEONAL
15 ARRELLANO.
- 16 5. Immediately after the accident TRAN was taken to the University of California
17 San Diego Medical Center where he stayed for approximately 3 months in a coma.
- 18 6. TRAN is presently at Sharp Medical Center in San Diego in a non-communicative
19 vegetative state where he has been for approximately 11 months.
- 20 7. TRAN, by and through his guardian ad litem, LE THI NGUYEN filed an action in
21 San Diego Superior Court against ARRELLANO, and also against Patricia Cole,
22 Chili’s Restaurants and the City of San Diego. San Diego Superior Court Case
23 number 37-2007-00065432-CU-PA-CTL, Department C-62, the Honorable Ronald
24 L. Styn, Judge.
- 25 8. Defendant ARRELLANO was charged with driving while intoxicated, failing to
26 stop at a stop sign and leaving the accident scene. ARRELLANO is presently
27 serving a 6 year sentence in the California prison system.
- 28 9. TRAN’s theory of liability against the CITY is based upon, among other things,

1 TRAN's allegations that the Stop sign which ARRELLANO failed to stop at was
2 obscured by foliage which the CITY permitted to grow on CITY owned property,
3 and that the CITY's negligence in not trimming said foliage created a dangerous
4 condition of public property. ARRELLANO also contends that the Stop sign was
5 obscured by foliage and that he was unable to see said Stop sign which is why he
6 failed to stop thereby colliding with TRAN. The CITY is conducting discovery on
7 those issues.

8 10. No judgments have been entered and no determinations of liability as to any party
9 have been made in the above referenced lawsuit filed in the San Diego Superior
10 Court. At this time no trial date has been set.

11 11. ARRELLANO is an illegal alien.

12 12. Despite his illegal immigration status, plaintiff Progressive West Insurance
13 Company sold ARRELLANO an automobile liability insurance policy in the
14 amount of \$15,000.00.

15 13. Prior to filing the above referenced San Diego Superior Court lawsuit, TRAN
16 made a demand on Progressive for ARRELLANO's \$15,000.00 liability policy.

17 14. It is TRAN's contention that Progressive did not tender the Liability Policy.
18 TRAN's position is that since Progressive failed to tender the Liability Policy
19 when demanded, the Liability Policy now has no liability limit and that Progressive
20 is liable for any amount which a jury may find ARRELLANO must pay.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct. Executed on November 27, 2007, at Manhattan Beach
23 California.

24
25
26 Joseph Di Monda
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I am a resident of the aforesaid county. I am over the age of eighteen years and not a party to the within action; my address is 1721 N. Sepulveda Blvd., Manhattan Beach, California 90266.

On November 27, 2007, I served the foregoing document(s) described as **NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; RULE 12(b)(1)**

on the interested parties in this action, by placing the original/true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

- I caused such envelope/package containing the document(s) to be delivered by hand to the offices of the addressee(s).

X The envelope was mailed with postage thereon fully prepaid. I am “readily” familiar with the firm’s practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

— I deposited the above document(s) for facsimile transmission in accordance with the office practice of Angelo & Di Monda for collecting and processing facsimiles. I am familiar with the office practice of Angelo & Di Monda for collecting, processing, and transmitting facsimiles. The facsimile of the above document(s) was transmitted to the interested parties on the attached service list:

Executed on **November 27, 2007**, at Manhattan Beach, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Gloria Henderson

1 Service List
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3 ROBIE & MATTHAI
4 James R. Robie
5 500 South Grand Avenue
6 15th Floor
7 Los Angeles, CA 90071
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